

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

3  
4 Brian Stanley Spicer,

5 Plaintiff

6 v.

7 United States Department of Veteran Affairs,

8 Defendant  
9

Case No.: 2:16-cv-03025-JAD-CWH

**Order Overruling Objection but Rejecting  
Report and Recommendation and  
Remanding for Rescreening**

[ECF Nos. 3, 5]

10 Brian Stanley Spicer sues the United States Department of Veteran Affairs for medical  
11 malpractice, claiming that its medical care providers' actions during his gynecomastia surgery  
12 fell below the standard of care required by Chapter 41A of the Nevada Revised Statutes.<sup>1</sup>  
13 Because Spicer moved for, and was granted, pauper status, his complaint was screened under 28  
14 U.S.C. § 1915(a).<sup>2</sup> Magistrate Judge Hoffman recommends that I dismiss his complaint with  
15 leave to amend because Spicer submitted his complaint without the medical-expert affidavit  
16 required by NRS 41A.017. Spicer objects, arguing that he should not be required to provide an  
17 affidavit because his allegations prove that his claim has merit and due process requires the court  
18 to permit his case to go forward.<sup>3</sup> Although I am unpersuaded by Spicer's arguments, in  
19 reviewing the report and recommendation, I came across a recent Ninth Circuit decision that  
20 suggests that the Circuit, were it to review this case, would not require Spicer to obtain an  
21 affidavit. Accordingly, I reject the recommendation and remand this case back to the magistrate  
22 judge for rescreening.  
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25 <sup>1</sup> ECF No. 4 at 13.

26 <sup>2</sup> ECF No. 3.

27 <sup>3</sup> ECF No. 5.  
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1 **DISCUSSION**

2 Spicer sues the United States Department of Veterans Affairs (VA)<sup>4</sup> for medical  
3 malpractice under NRS Chapter 41A and the Federal Tort Claims Act (FTCA), 28 U.S.C. §§  
4 1346(b) et seq. He claims that he was examined and diagnosed with gynecomastia by the VA  
5 medical-care providers in August 2014 and underwent an unsuccessful surgery to correct it on  
6 October 6, 2014. He alleges that the medical treatment and care he received fell below the  
7 standard of care. He prays for more than \$1 million.<sup>5</sup>

8 Because Spicer sought and was granted pauper status for this case, Magistrate Judge  
9 Hoffman screened his complaint under 28 U.S.C. § 1915(a).<sup>6</sup> The magistrate judge properly  
10 noted that medical-malpractice claims against federally funded health-care facilities and their  
11 employees acting in the scope of that employment must be brought under the FTCA, as Spicer  
12 brings this case. And, because Spicer also brings this action under Nevada’s medical malpractice  
13 statute, NRS 41A.009 et seq., which requires all medical-malpractice actions to be “filed with  
14 ‘an affidavit, supporting the allegations contained in the action,’”<sup>7</sup> the magistrate judge  
15 recommends that I dismiss Spicer’s complaint because it lacks that statutorily required affidavit.<sup>8</sup>  
16 Indeed, NRS 41A.071 states that a district court “shall dismiss the action, without prejudice, if  
17 the action is filed without” an affidavit by a medical expert setting forth “factually a specific act  
18 or acts of alleged negligence.”<sup>9</sup>

19 But a Ninth Circuit panel in an unpublished disposition recently reversed one of this  
20 district’s no-affidavit dismissals. In doing so, the panel “predict[ed] that the Supreme Court of

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22 <sup>4</sup> ECF No. 4.

23 <sup>5</sup> *Id.*

24 <sup>6</sup> ECF No. 3.

25 <sup>7</sup> *Zohar v. Zbiegien*, 334 P.3d 402, 405 (Nev. 2014) (quoting Nev. Rev. Stat. § 41A.071).

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27 <sup>8</sup> ECF No. 3.

28 <sup>9</sup> Nev. Rev. Stat. § 41A.071.

1 Nevada would hold that” an FTCA plaintiff suing the VA “does not have to comply” with the  
2 affidavit requirement “even when a doctor or other medical professional committed the  
3 underlying negligent acts or omissions.”<sup>10</sup> It added that the state’s affidavit requirement likely  
4 does not apply under the *Erie* doctrine because it “may be viewed as procedural, rather than  
5 substantive. And federal law, not state law, governs all procedural aspects of a claim under the  
6 FTCA,” which “contains no affidavit requirement.”<sup>11</sup>

7 Although that unpublished disposition in *Kornberg v. Department of Veterans Affairs* is  
8 not binding, it suggests to me how the Ninth Circuit would approach the NRS 41A.071 affidavit  
9 requirement were it to consider this issue on appeal. So, in an exercise of caution, and because  
10 the nature of the claim in *Kornberg* was materially indistinguishable from Spicer’s, I do not  
11 require Spicer to provide a medical-malpractice affidavit to survive screening. I thus reject the  
12 magistrate judge’s recommendation of dismissal and instead remand this case back to the  
13 magistrate judge for rescreening in light of this order. Spicer is cautioned that, although he is not  
14 required to provide a medical expert’s affidavit to *plead* his claim, this ruling says nothing of the  
15 quantum or quality of evidence that may be required to *prove* his claim.

### 16 Conclusion

17 Accordingly, IT IS HEREBY ORDERED that Spicer’s Objection to the Screening Order  
18 [ECF No. 5] is **OVERRULED**;

19 Nevertheless, I do not adopt the Report and Recommendation [ECF No. 3] for dismissal  
20 with leave to amend. Instead, I **REMAND this case back to Magistrate Judge Hoffman for**  
21 **rescreening** in light of this order.

22 January 26, 2018

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24 U.S. District Judge Jennifer A. Dorsey  
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26 <sup>10</sup> *Kornberg v. United States*, 692 Fed. Appx. 467, 468 (unpublished) (9th Cir. June 13, 2017).

27 <sup>11</sup> *Kornberg*, 692 Fed. Appx. at 469 (internal citations omitted).  
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